SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

No.73—758

October term, 1973

ROY VROOM, Petitioner,

v.

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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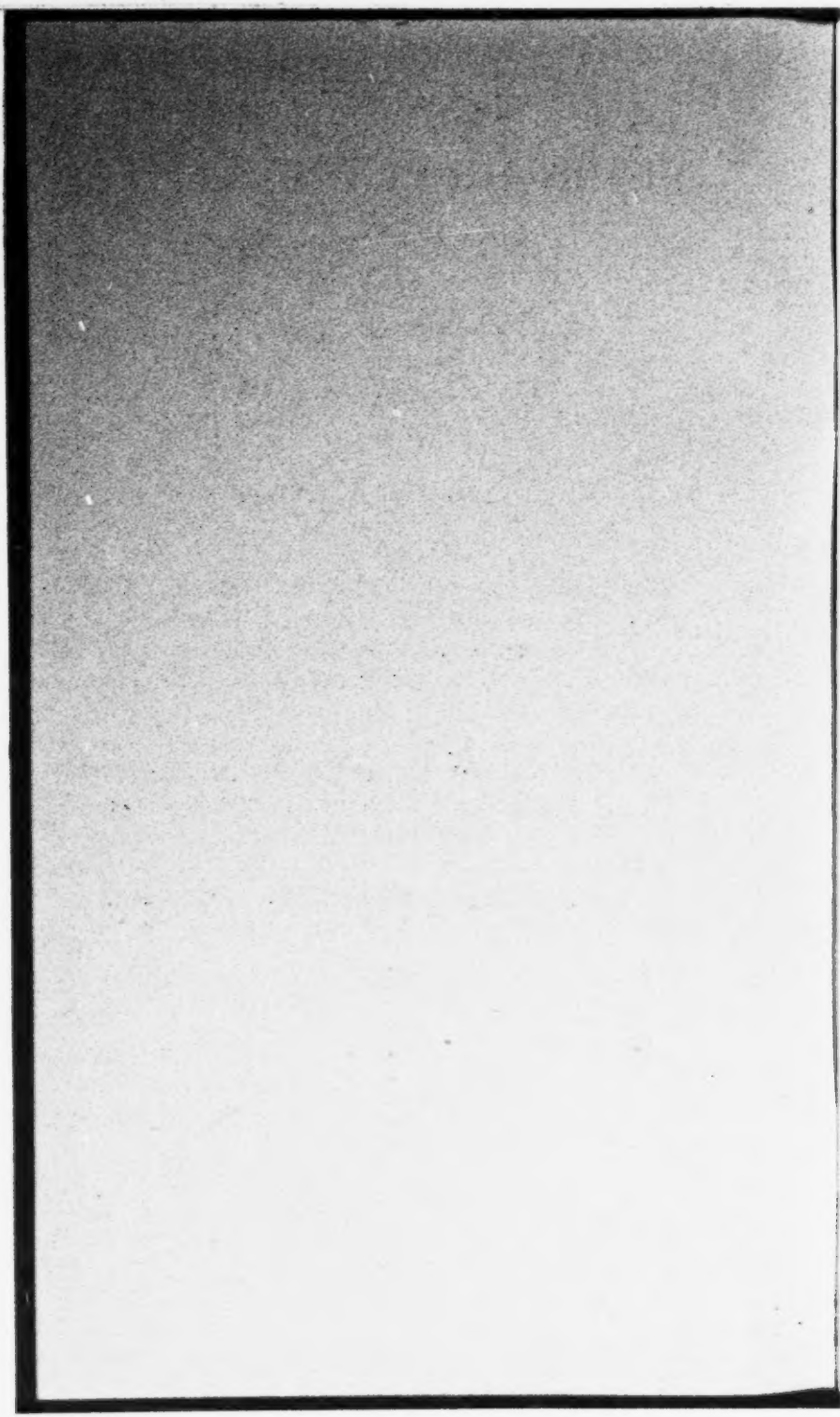

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OPINIONS BELOW

The opinion of the District Court (App. p.i of Petition) is reported at 342 F. Supp. 687 (D. Colo. 1972). The opinion of the Court of Appeals for the Tenth Circuit (App. p.xxxix of Petition) is reported at 481 F.2d 34.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The United States District Court impressed a constructive trust upon shares of common stock as a remedy for petitioner Vroom's wrongful acquisition of those shares, and provided that the other stockholders, respondents here, "shall have 30 days from the date judgment in this case becomes final within which to exercise their rights to purchase, and pending the expiration of that 30 day period, the stock which plaintiffs are entitled to purchase is impressed with a trust in their favor." (342 F. Supp. 687, 698; App. xxii-xxiii of Petition). Petitioner made timely motions for new trial or in the alternative for amended findings and judgment, and for a stay of execution of or any proceedings to enforce the judgment, and appealed to the United States Court of Appeals in timely fashion. During the course of these actions, petitioner Vroom also moved the court for an order relieving him from the portion of the judgment imposing the constructive trust, on the ground that the time for tender of the purchase price of the stock began to run at the time the judgment became enforceable for purposes of execution. The District Court denied that motion, stating that the time for performance ran for thirty days from the time when the judgment became final on appeal.

The questions then presented are:

1. Where a trial court gives plaintiffs thirty days from the day its decree "becomes final" to tender the purchase price for stock impressed with a constructive trust, does such time run from the date the judgment becomes final on appeal?

2. Where a court holds that an appeal postpones the time for performance of a condition in a decree, does this necessarily constitute a holding that the decree was not previously enforceable, where no attempt has been made to judicially enforce the decree?

STATUTE AND RULES INVOLVED

Title 28, United States Code, Federal Rules of Civil Procedure:

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting,

dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

* * *

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Rules 69(a) and 70 are set forth in the Petition at pp. 4-5.

STATEMENT OF THE CASE

This action was brought in March 1971 to impress a constructive trust upon certain shares of stock in West End Development Company which had been purchased by petitioner Roy Vroom from former stockholders. Other claims for relief, not brought before this Court by Vroom, were in the nature of derivative claims on behalf of West End Development Company, to recover certain sums paid by the company to Vroom, who served as its president and sole operating officer while these respondents were scattered around the globe in the United States Army Nurse Corps and in the Veterans' Administration.

The District Court found against Vroom on the derivative claims and entered judgment against him in the amount of $18,176.00 plus interest. The Court ruled that he had wrongfully caused the corporation to pay him a secret retroactive salary when the corporation had no working capital and had to borrow the money for the payment. The Court also ruled that Vroom had wrongfully caused the corporation to pay him interest on money which he loaned to the corporation. Funds for payment of both the illegal salary and the illegal interest were obtained by the corporation from a large bank loan. (342 F. Supp. 687, 700-701; R.Supp. Vol. II, 183).

The stock upon which the constructive trust was imposed had been purchased by Vroom from other stockholders, the Taylors, in September of 1965, but the nurses, respondents here, did not learn of the transfer until the following March. "Even so, when the nurses learned of the sale of Taylors' stock to Vroom they had no reason to object because they were unaware of the restriction on its sale. They had no knowledge of the restriction until they received copies of the Articles of Incorporation in 1970." 481 F.2d 34, 39. This was only after the nurses had been dissuaded from hiring independent counsel by Vroom, ". . . and still innocently acting on their misplaced trust in Vroom, they followed his recommendation and consulted the Denver attorneys for West End Development

Company." 342 F. Supp. 687, 694. This attorney had the power, under powers of attorney suggested by him to the nurses, to enforce any agreements with Vroom. "This the attorney selected by the plaintiffs in reliance on Vroom's recommendation did not do . . ." 342 F. Supp. 687, 695 (1972). Indeed, it was not until 1970, when the nurses had retained independent counsel, that they learned of the restrictions on the transfer of shares contained in the Articles of Incorporation. (R. Vol. I, 67, 70, 71, 79, 80, 87, 88, 94, 95). This explained the long delay in filing suit based on this breach of Vroom's fiduciary duty. In response to an affirmative defense based upon the statute of limitations, the District Court denied the defense, saying: " . . . it comes with poor grace for Vroom to say that plaintiffs' claims now are barred by a statute of limitations which defense, even under Vroom's view of the facts, would not have been available if the attorney presently asserting that defense had acted." 342 F. Supp. 687, 695.

To remedy the situation created by what it called "this sordid tale", 342 F. Supp. 687, 694, the District Court impressed a constructive trust on the shares wrongfully purchased by Vroom until "thirty days from the date judgment in this case becomes final, and if such tender of the purchase price determined by the District Court be not made, the trust hereby impressed shall be released." (emphasis added) (R. Vol. III, 304).

The Judgment and Decree of the District Court was entered May 11, 1972. On May 22, 1972, Vroom moved for a new trial and for an order amending the findings of the court. (R. Vol. III, 305) On June 23, 1972, The District Court denied the Motion for New Trial and amended its findings in respects not now material. (App.iii) On June 5, 1972, Vroom moved the District Court for a stay of execution of or any proceedings to enforce the judgment, pursuant to Rule 62(b), Federal Rules of Civil Procedure, (App.i) which was also denied by the District

Court's order of June 23, 1972. (App.v) No appeal was taken from this order.

On July 21, 1972, Vroom filed a Notice of Appeal with respect to the Judgment and Decree of May 11, 1972. On November 6, 1972, 179 days after entry of the Judgment and Decree of the District Court, Vroom filed a motion for relief from the District Court's Judgment and Decree on the ground that the judgment was final when entered on May 11, 1972, and no tender of the purchase price for the shares having been made within 30 days of that date, the constructive trust had been released and that portion of the judgment had been satisfied. (App. to Petition, xxxiv) On November 20, 1972, the District Court denied Vroom's motion, noting in its Order that "It was the intention of the Court to impose a constructive trust until thirty days after the judgment or order of the final court to which an appeal is taken, and therefore it is Ordered, that Defendant Vroom's Motion for Order Granting Relief from final Judgment Under Rule 60(b) of the Federal Rules of Civil Procedure be denied." (App. to Petition, xxxvii-xxxviii)

The denial of this motion was appealed to the Tenth Circuit Court of Appeals, which affirmed the ruling of the District Court.

SUMMARY OF ARGUMENT

From a reading of the Petition, it appears that petitioner is attempting to argue that the holding of the court below is that the judgment and decree of the District Court was not enforceable ten days after its entry, pursuant to Rule 62, Federal Rules of Civil Procedure. This was not the holding. The courts below merely held that where a decree provides that a condition must be performed within 30 days from the date the judgment becomes final, that such a time period runs from the time the judgment becomes final on appeal. It is clear from the order that pending the expiration of such period, a constructive trust has been imposed on the stock so that it will be preserved

for the benefit of those plaintiffs who choose to tender within the time allowed. Thus the constructive trust has been in force from the entry of the District Court's order to preserve the subject matter of this litigation, pending the resolution of this appeal. The court below did not address itself in any manner to the question of when the decree of the District Court became final for purposes of enforcement, since that question was never raised by any attempt to obtain judicial enforcement, and no appeal was taken by petitioner Vroom from the denial of a stay of enforcement.

The court below only decided that the language of the judgment and decree of the District Court gave the plaintiffs thirty days from the time the judgment becomes final on appeal within which to perform a condition precedent to a vesting of their rights to the stock in dispute. This question had nothing to do with the enforcement of the judgment and decree at the time of entry. The consistent ruling of all the courts which have passed on this narrow question is that whether the judgment is final for purposes of enforcement is irrelevant, and " . . . that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties . . . " 481 F.2d 34, 39 (1973). It would obviously be a useless act to require a party to perform a condition precedent to a right when the party's right is still subject to a final decision on appeal.

Finally, any questions which might have been raised by Vroom have been rendered moot by his acceptance and retention of the tendered purchase price for the shares with respect to three of the nurses. Paradoxically, Vroom suggests that his obligation to deliver the shares has been suspended by this appeal, while arguing here that the time for performance of the nurses' duty could not be suspended or extended by appeal.

ARGUMENT

I.

THE COURT OF APPEALS' DECISION DID NOT DETERMINE WHETHER THE DECREE OF THE DISTRICT COURT WAS FINAL FOR PURPOSES OF ENFORCEMENT TEN DAYS AFTER ITS ENTRY.

A.

No Attempt Has Been Made To Judicially Enforce The Judgment and Decree.

The petition seems to argue that the Court of Appeals held the judgment and Decree of the District Court was not enforceable ten days after entry. In order to create an apparent conflict between the various courts of appeals, it is necessary for Vroom to interpret the holding of the court below as meaning that the decree of the District Court was not enforceable until all appeals had been taken, or the time for taking them had lapsed. Nothing in any remark of either court below justifies such an interpretation. Rather, the Court of appeals said:

> Thus the appeal suspended the time for performance by the nurses of tendering payment for the shares of stock available to them through the imposition of the constructive trust on the Taylor stock. 481 F.2d 34, 40.

In this case a motion for a stay was denied and not appealed, and no attempt has been made to enforce the constructive trust through further judicial proceedings under Rule 70, Federal Rules of Civil Procedure. Thus it was not necessary for the Court of Appeals to rule upon the enforceability of this trust pending appeal. The nurses agree with Vroom that it is presently enforceable, and see nothing in the opinion of either court to the contrary. That no attempt was made to tender the purchase price while motions to alter the judgment were pending in the trial court or while an appeal was

pending in the Court of Appeals only reflected the nurses' belief that the time for tender began when the decree was final on appeal, and their disinclination to perform a useless act. It was not until a favorable decision had been rendered by the Court of Appeals that a tender was made, as will be noted hereinafter. The absurdity of Vroom's position can best be seen by the fact that he is arguing that the nurses should have tendered during the time while his motions were pending in the trial court to reverse its decision on the merits, or for a new trial. During this time, and during the appeal which followed, even if the nurses had held the stock, they could not have sold it, encumbered it, or voted it for a sale of all of the corporate assets or for liquidation, for to do so might have defeated the jurisdiction of the courts over the trust res. Such action certainly would have subjected them at least to injunctive relief, if not to contempt of the court in which the matter was pending. c.f. Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527 (1911).

B.

No Appeal Has Been Taken From the Denial of A Stay of Enforcement of the District Court's Decree Which Could Raise the Question of its Enforceability.

On June 5, 1972, Vroom moved the District Court for a stay of execution of or any proceedings to enforce the judgment. (App.i) After June 11, 1972, while this motion was still pending, Vroom did not suggest its mootness on the ground that the thirty days had expired. This motion was denied by the District Court on June 23, 1972. (App.v.) No appeal was taken from this order, and the Court of Appeals did not address itself to this matter, so that no decision has been brought before this Court which raises any question about when the judgment and decree of the District Court first became enforceable, as opposed to the question of when its enforceability expires, which is the precise and only question of this nature decided by either court below.

Vroom has attempted to reverse the posture of this case by arguing that if the judgment and decree of the District Court was enforceable ten days after entry, and its enforceability was not suspended by filing a supersedeas bond, then the time for tender must expire thirty days after entry of the judgment. Such an argument effectively amends the District Court's order to read "30 days after entry"; an amendment which Vroom argues that even the District Court had no power to make. Vroom's argument also seems to be that if the decree is held to be enforceable for 30 days after the final appeal, then the Court of Appeals must have held that it was not enforceable earlier. It should be noted that all of Vroom's analysis must proceed without one word of assistance from the opinion of either court below, since neither of them spoke to this proposition. Not only did neither court below so hold, but such an argument misses the historic distinctions between law and equity which are recognized in Rule 62, Federal Rules of Civil Procedure. This Court has long recognized that supersedeas is a common law writ which stays execution of a judgment at law, but which did not apply to a decree in equity, which was stayed by an appeal in England until 1772. **Hovey v. McDonald**, 109 U. S. 150 (1883).

That a supersedeas does not affect a decree in equity is obvious from Rule 62. Rule 62(d) provides that a stay may be obtained by an appellant by giving a supersedeas bond, subject to the exceptions contained in subdivision (a) of Rule 62.

The effect of an appeal on a proceeding in equity is not to stay the effect of the lower court's decree, whether granting or denying equitable relief, under Rule 62(c). Here no stay of the constructive trust was requested, and none granted, so it ramained in effect, **Hovey v. McDonald**, 109 U. S. 150 (1883); **Slaughter House Cases**, 10 Wall. (77 U. S.) 273 (1870), unless it terminated by its own terms. Indeed, even where a bill requesting injunctive relief has been dismissed, and an injunction granted pending appeal, it has been held that the injunction

continued after the appeal was dismissed without opinion, as long as the time for filing an application for rehearing had not expired, and the time for issuance of the Court's mandate had not run. **Merrimack River Savings Bank v. City of Clay Center**, 219 U. S. 427 (1911). In **Leonard v. Ozark Land Co.**, 115 U. S. 465 (1885), an injunction was granted by the trial court against cutting any trees or removing any staves from the land in question, and an appeal, which the Court noted operated as a supersedeas, having been taken, this Court affirmed the holding of the trial judge that the supersedeas did not suspend the effect of the injunction.

C.

Whether The Decree Was Enforceable Immediately Upon Its Entry Is Irelevant to the Question of When Its Enforceability Terminates.

The courts have uniformly held that whether a decree in equity is suspended or not by an appeal, or by filing a bond or obtaining a stay, the time within which performance of a condition must be tendered runs from the final resolution of the dispute.

A case similar to the present one is **Fenton v. Farmers' & Merchants' Nat. Bank**, 27 Tex. Civ. App. 231, 65 S.W. 199 (1901). There the bank was given the right to pay into the court for the benefit of its adversaries a certain sum within 90 days after the date of judgment and thus purchase certain realty interests from them; if, however, the bank did not pay within the time it would recover nothing. The parties prosecuted an appeal and the bank did not tender within 90 days of the date of the trial court's judgment. The bank's adversaries contended that the bond filed for appeal was only a cost bond, not a supersedeas bond. The court held that it was a supersedeas bond, and that it and the appeal suspended the finality of the trial court's judgment, but cited in its opinion **Texas Trunk Ry. Co. v. Jackson**, 85 Tex. 605, 22 S.W. 1030 (1893). The Opinion in that case by Chief Justice Stayton makes clear that the

nature of the bond does not affect 'finality' for purposes of performance of conditions:

> ". . . We are of opinion that appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives a judgment of that finality of character necessary to entitle it to admission in evidence in support of the right or defense declared by it, and from this necessarily follows the insufficiency of a plea in bar, based on it. That, under the statute, execution may be issued, and the judgment be inforced, during the appeal, when only a cost bond has been given, do not affect the question, for this is by virtue of the statute, which does not undertake to determine the status of the judgment in reference to any matter involved in the questions certified. 22 S.W. 1030, 1032.

This rationale was subsequently followed in **Dignowity v. Fly**, 110 Tex. 613, 210 S.W. 505 (1919):

> "In like manner, when a decree of the trial court expressly allows a party a certain time thereafter within which to perform an act, such time does not begin to run until denial of a writ of error, in cases where application therefor is made to this court. **Hume v. Moore**, 204 S.W. 382."

And see **Williams v. Waxahachie National Bank** 51 S.W. 2d 1073 (Tex. Civ. App. 1932).

In a great many cases the courts have either ignored entirely the question of whether the enforcement of the judgment was stayed pending an appeal, or have stated that whether a stay was in effect was irrelevant to the question of time for performance of a condition of the decree, **King v. King**, 2 Wash. App. 386, 468 P. 2d 464 (1970); **Fain v. McCain** 199 S.W. 889 (Tex. Civ. App. 1918); **Smith v. Chytraus**, 152 Ill. 664, 38 N.E. 911 (1894); **Borrow v. El Dorado Lodge**, 75 Ariz. 218, 254 P. 2d 1027 (1953); **Northwestern Wisconsin Elec. Co.**

v. Public Service Commission, 248 Wis. 479, 22 N.W. 2d 472 (1946). Thus Vroom's fundamental error is failure to recognize that "final" does not have a fixed and single meaning for all purposes; while it may be final for purposes of appeal and execution, it may not yet be final for purposes of terminating the litigation, collateral estoppel, or performance of a condition.

II.

THE INTERPRETATION OF THE DISTRICT COURT'S ORDER IS CONSISTENT WITH PRIOR JUDICIAL INTERPRETATIONS, NONE OF WHICH ARE DETERMINED BY WHEN A DECREE FIRST BECAME ENFORCEABLE.

The District Court, in impressing a constructive trust on shares of stock fraudulently acquired by Vroom, impressed it until 30 days after the judgment "becomes final." (emphasis added). The Court could have impressed it until 30 days from the date of entry of its Judgment and Decree, or until June 11, 1972. It did not do so, recognizing that further motions to the trial court or further appeals might leave the merits of this case, and the nurses' ultimate right to purchase the shares, unresolved for a substantial time. That Vroom recognized this is clear from the fact that in his motion to fix the amount of the supersedeas bond filed on June 26, 1972, no mention was made of any contention that the constructive trust had expired. (App.vi) It was only after several hearings where no suggestion of expiration of the constructive trust had been made, 179 days after entry of the District Court's Judgment and Decree, that Vroom finally suggested to the trial judge that the constructive trust had expired 149 days before.

The question raised in this case is only what the District Court meant when it gave the nurses 30 days to tender the purchase price for the fraudulently acquired shares from the date when the Judgment and Decree "becomes final." The District Court's interpretation of its own Judgment and Decree, aside from being obvious, is consistent with that of the majority

of courts which have granted equitable relief subject to performance of a condition precedent by the plaintiff. In none of these cases was it thought necessary to discuss the effect of the rules of procedure, since the language of the decree speaks for itself. Suspension or extension of the time for performance of a condition of a decree is analogous to the long-established Federal rule that a motion for new trial, for judgment n.o.v., to amend findings of fact or to alter or amend the judgment suspends the time allowed for taking whatever action is required by the rules to perfect an appeal, which is also a condition precedent to a right—that of being heard on the merits on appeal. Federal Rules of Appellate Procedure, Rule 4(a). This was the rule followed even before former Rule 73(a), Federal Rules of Civil Procedure, was amended in 1946 to expressly so provide, **United States v. Crescent Amusement Co.**, 323 U.S. 173, (1944); **Leishman v. Associated Wholesale Electric Co.**, 318 U.S. 203, (1943), and before the adoption of the Federal rules of Civil Procedure, **Morse v. United States**, 270 U.S. 151, 153-54, (1926), and cases cited.

That the District Court's meaning was obvious to those who were before it at the time of its entry is best evidenced by the fact that it took Vroom 149 days to suggest to the District Court that the time for performance of its decree had already expired—time during which Vroom attempted to obtain a stay of enforcement which would have been entirely unnecessary had he taken this position earlier. Indeed, to this date, Vroom has cited no cases involving an equitable decree awarding relief only after performance of a condition precedent by the plaintiff.

Numerous cases hold that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties, so the party who is to perform the condition has the specified time for its performance from the time that the judgment or order of the appellate court becomes effective. See 4 Am.Jur.2d, Appeal and

Error, § 363 (1962), and annotation, 28 A.L.R. 1029 (1924) and cases cited. The rule has been consistently applied in **King v. King**, 2 Wash. App. 386, 468 P.2d 464, 466-67 (1970) (time for performance of a condition in a divorce decree dividing property); **City of Vernon v. Superior Court**, 38 Cal. 2d 509, 241 P.2d 243 (1952) (time for performance of condition in decree abating a nuisance); **Uthoff v. Thompson**, 176 La. 599, 146 So. 161 (1933), and **Fain v. McCain**, 199 S.W. 899 (Tex. Civ. App. 1918) (time for payment to defendant for value of improvements in a quiet title action); **Smith v. Chytraus**, 152 Ill. 664, 38 N.E. 911 (1894) (time for payment in order to receive a certificate of purchase to land); **Ricard v. Gollen**, 91 Ida. 335, 421 P.2d 130 (1966) and **Borrow v. El Dorado Lodge**, 75 Ariz. 218, 254 P.2d 1027 (1953) (time to comply with order of remitter); **Northwestern Wisconsin Elec. Co. v. Public Service Commission**, 248 Wis. 479, 22 N.W.2d 472 (1946) (time for payment of purchase price for property being acquired in eminent domain); and in a variety of contract and bond cases making a payment mandatory on "final judgment": **Wolfer v. Hurst**, 47 Ore. 156, 80 P. 419 (1905); **Roberts v. Central Mutual Ins. Co.**, 285 Ill. App. 408, 2 N.E.2d 132 (1936) and **Dean v. Marshall**, 90 Hun. 335, 35 N.Y. Supp. 724 (1895). And the term "final judgment" has been so interpreted in numerous statutes: **Carroll Elec. Co. v. Snelling**, 62 F.2d 413 (1st Cir. 1932) (time for proving claims against a bankrupt's estate); **Farquharson v. Fresno Oil Co.**, 9 F.2d 515 (8th Cir. 1925) (statute of limitations for bringing suit on foreign judgments); **In re Metcalf**, 17 Fed. Cas. 172 (No.9, 494) (S.D.N.Y. 1867) (prohibition against prosecuting claims provable in bankruptcy court to final judgment elsewhere as applied to prosecuting an appeal); **Twin Ports Oil Co. v. Pure Oil Co.**, 26 F. Supp. 366 (D. Minn. 1939) and **International Shoe Mach. Corp. v. United Shoe Mach. Corp.**, 315 F.2d 449 (1st Cir. 1963), **certiorari denied**, 375 U.S. 820 (1963) (actions under Sec. 5 of Clayton Act based upon prior final judgment of antitrust violation in criminal

antitrust cases). Indeed, in at least one such situation, Congress has codified this sensible rule that a judgment is not truly final until the time has run for appeals, and has provided that a judgment in one United States District Court may not be registered in another District Court until it ". . . has become final by appeal or expiration of time for appeal . . ." 28 U.S.C. § 1963. And in criminal cases, where a timely motion for new trial is jurisdictional, the courts have held that an appeal suspends the time for filing such a motion to two years from the affirmance of the conviction. **Casias v. United States**, 337 F.2d 354 (10th Cir. 1964); **United States v. Chisum**, 436 F.2d 645 (9th Cir. 1971); **Smith v. United States**, 283 F.2d 607 (D.C.Cir. 1960); certiorari denied 364 U.S. 938 (1961); **United States v. Granza**, 427 F.2d 184 (5th Cir. 1970).

III.

THE DISTRICT COURT DID NOT AMEND ITS OWN ORDER AFTER SATISFACTION OF THE JUDGMENT.

The only motion to alter or amend the judgment of the District Court which was filed in this case was by Vroom, who argued that it had been satisfied by a lapse of time. The motion was denied. No order has ever been entered altering the terms of the judgment and decree herein. To take an interpretation of that decree which happens not to agree with one's own interpretation (which was not urged upon the trial court for nearly six months after its entry) and to call it a modification of the judgment is sophistic. In **Leonard v. Ozark Land Co., supra**, 115 U.S. 465 (1885), where an injunction had been granted by the trial court against "cutting or removing any trees, logs or timber, or any staves manufactured from any trees or timber" upon the land in question, the trial court, in allowing an appeal which operated as a supersedeas, directed that it should "not operate to suspend or affect so much of the decree * * * as enjoins the defendants . . ." 115. U.S. at 465.

The opinion, addressing itself to the question of whether the subsequent ruling of the trial court was an enlargement of the injunction, stated:

> ". . . the order made by the judge when he allowed the appeal is in reality nothing more than notice to the appellant that such was the effect of his decree. It was not, and was not intended to be, an enlargement of the original scope of the injunction, but, under the circumstances, a justifiable precaution against a possible misunderstanding by the appellant of the extent and effect of the decree appealed from." 115 U.S. at 468.

Where the trial court's remarks were, as here, nothing more than a justifiable interpretation of an existing decree, and the interpretation is consistent with a common understanding of the words, and common sense under the circumstances, it can hardly be called an amendment. And many courts have distinguished between "final judgment for purposes of appeal" which is akin to what petitioner here urges, and "final judgment for purposes of terminating the litigation between the parties." In **Dean v. Marshall**, 90 Hun. 335, 35 N.Y. Supp. 724, 725 (1895), where the court was asked to determine the meaning of "final judgment" in a stipulation between the parties, the opinion noted:

> "The term is susceptible of two other significations,—one, which, in a strict legal sense, is its true meaning, viz. a determination of the rights of the parties after a trial, whether such is the subject of review or not; and the other, its colloquial use or signification, which makes it synonymous with 'decisive' or a judgment that cannot be appealed from, and which is perfectly conclusive upon the matter adjudicated."

To the same effect are **Roberts v. Central Mutual Ins. Co.**, 285 Ill. App. 408, 2 N.E.2d 132, 134 (1936), and **Wolfer v. Hurst**, 47 Ore. 156, 80 Pac. 419, 420 (1905). In **Northwestern Wisconsin Elec. Co. v. Public Service Commission**, 248 Wis. 479, 22 N.W.2d 472, 474 (1946), in discussing when a commission order requiring a village to pay a condemnation award "within four months from the effective date of this order" had expired,

where an appeal extended several years after the order, the court stated:

> "It is, of course, not for this court to redraft orders of the commission in order to conform them to some unexpressed intent of the commission. We must find language in the order that will accommodate itself to the intention which we ascribe to the order. In this case, the term 'final judgment' must be capable of being taken in such a sense. The term will, of course, accommodate itself to the contentions of the plaintiff. In many situations the term 'final judgment' does refer to that judgment in the lower court which terminates proceedings there and that this is true is so well known and so long established that we shall not labor the point or attempt any documentation of it. However, this is not the only sense in which the term 'final judgment' can be taken. In Bipler's Appeal, 59 Cal. 550, it is pointed out that while the term 'final' is frequently used in connection with the word 'judgment' to distinguish from interlocutory orders or judgments in the same court, the term 'final judgment' also describes a determination effective to conclude further proceedings in the same cause by an appeal or otherwise. [citations omitted] This meaning can be attributed to the term 'final judgment' more easily in cases where a period of time within which to act is limited to run from a final judgment."

Clearly it is not straining the meaning of the words "final judgment" in the District Court's order to interpret the time as running from the final determination of the parties' rights herein, when the tender will no longer be a futile act.

IV.
THE ISSUE OF TIMELINESS OF TENDER IS MOOT WITH RESPECT TO THREE OF THE RESPONDENTS.

On July 27, 1973, tender of cashier's checks in amounts sufficient to satisfy the decree of the District Court was made to Vroom personally by respondent's counsel on behalf of

Marguerite Irwin, Lois McCaleb and June M. Lease, respondents herein. The tender was accompanied by a letter of the same date, which gave Vroom until July 28, 1973 to accept or reject the tender. Because counsel for respondents had been unable to contact Vroom's counsel by telephone prior to making such tender, the time for accepting or rejecting the tender was orally extended to Monday, July 30, 1973. This tender was made within 30 days of the order of the Court of Appeals dated June 29, 1973. On August 3, 1973, tender was made on behalf of Julia G. Crowley, pursuant to a letter of even date, hand delivered to Vroom. No indication of rejection of the July 27 tender was given by Vroom by July 30, and Vroom continues to hold funds represented by cashiers' checks from Ms. Lease, Ms. Irwin and Ms. McCaleb for the purchase price for the shares subjected to the constructive trust. Only by letter dated August 7, 1973, did Vroom's counsel attempt to vary the terms of the tender Vroom had previously accepted. (App.vii) In that letter counsel for Vroom, as an excuse for non-delivery of stock certificates to the respondents Irwin, Lease and McCaleb, noted the appeal taken from the District Court's order and the pendency of a petition for rehearing in the Court of Appeals—obviously a contention that there was not yet a final judgment of the District Court to be obeyed, or if there was, that its effect was suspended during the course of this appeal.

It is obvious that Vroom cannot have it both ways—insisting here that the judgment of the District Court expired by its terms over a year ago, despite the contrary ruling of two courts below, and at the same time insisting to respondents that the effectiveness of that order is suspended by appeals, so that it need not be obeyed. It is clear that a tender has been accepted, and that petitioner has a duty to deliver stock certificates to three of the respondents from whom he has accepted money, and that the appeal is moot as to them.

The law is well settled that "A creditor must accept or reject a tender as it is made; he cannot make his acceptance

conditonal or qualified by prescribing the terms of his acceptance." 52 Am. Jur. Tender § 27 (1947). And see **Avery v. Schuman Co.**, 159 F. Supp. 906 (S.D. Calif. 1958); **Mumm v. Taylor**, 121 Colo. 157, 213 P.2d 836 (1950); **State ex rel. Attorney General v. Mize**, 204 Miss. 886, 36 So.2d 143 (1948); **Clasen v. Moore Bros. Realty Co.**, 413 S.W.2d 592 (Mo. App. 1967); **Swain v. Kayko**, 44 Mich. App. 496, 205 N.W.2d 621(1973); **Emerson v. Treadway**, 270 S.W.2d 614 (Mo. App.1954); **Equitable Life Assur. Soc. v. Brandt**, 240 Ala. 260, 198 So. 595. 134 A.L.R. 555(1940)

CONSLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

William J. Carney
University of Wyoming
College of Law
P.O. Box 3035
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J. D. Muller
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[APPENDIX]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,

Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation; Donald C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the WEST END DEVELOPMENT COMPANY,

Defendants.

MOTION TO STAY EXECUTION OF OR ANY PROCEEDINGS TO ENFORCE JUDGMENT

Defendants, by their attorneys, Helmick, Conover & Burkhardt, move the Court, pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, for an Order staying the execution of or any proceedings to enforce the judgment entered herein on May 11, 1972 pending the disposition of Defendants' Motion for New Trial or in the Alternative for

Amended Findings and Judgment and for a period of 30 days from the date the judgment becomes final; and

As grounds for said Motion Defendants state as follows:

1. The Judgment and Decree entered herein on May 11, 1972 included the impression of a constructive trust upon 30.76 shares of stock of West End Development Co. owned by Defendant Roy Vroom and was conditioned upon a tender by Plaintiffs of the purchase price for said shares of stock, said tender to be made within 30 days from the date the judgment becomes final.

2. Defendants have filed a Motion for New Trial or in the Alternative for Amended Findings and Judgment, and submit that the judgment of this Court is in error and should be amended or a new trial grated.

3. In the event that said Motion of Defendants is not granted, Defendants intend to file a Notice of Appeal, file a supersedeas bond and take such other steps as are necessary to perfect an appeal to the United States Court of Appeals for the Tenth Circuit.

4. Accordingly, Defendants submit that a stay of execution of the judgment herein pending the disposition of Defendants' Motion for New Trial and for a period of 30 days from the date the judgment becomes final is appropriate and necessary under the circumstances.

HELMICK, CONOVER & BURKHARDT

By /s/Frederic K. Conover II
Attorneys for Defendants
700 Denver Club Building
Denver, Colorado 80202
Telephone: 292-9450

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER AMENDING
	)	FINDINGS OF FACT
WEST END DEVELOPMENT	)	AND DENYING
COMPANY, et al.,	)	MOTION FOR NEW
	)	TRIAL
Defendants.	)	

Defendants have filed a motion for new trial or in the alternative for amended findings and judgment. The parties have filed a written waiver of oral argument of this motion, and the Court has reconsidered its findings. The findings of fact are amended as follows:

The sentence appearing on page 11 of the Court's memorandum opinion reading:

> "Less than four months after the June 4, 1969, resolution, another resolution signed by Vroom as president and Powers as secretary [Sabin apparently didn't participate in the meeting] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security."

is amended to read:

> "Less than four months after the June 4, 1969, resolution, another resolution signed by Vroom as president and

> Powers as secretary [Sabin did not sign these minutes] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security."

The sentence commencing at the bottom of page 11 of the Court's memorandum reading:

> "Not all of the remaining loan proceeds of $32,654.85 can be said to have been 'used to improve the tennis club site further,' because on March 23, 1970, Vroom and Powers voted [Sabin was not present] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, . . ."

is amended to read:

> "Not all of the remaining loan proceeds of $32,654.85 can be said to have been 'used to improve the tennis club site further,' because on March 23, 1970, Vroom and Powers voted [Sabin did not sign the minutes] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, . . ."

The language appearing on page 28 of the Court's memorandum reading:

> "Nor, unless Vroom can escape under the provisions of Article VII of the Articles of Incorporation, was there a quorum of directors who voted the salary. It is to be remembered that only Vroom and his personal secretary authorized the $15,000.00 salary, and under general principles of Colorado corporation law, Vroom wasn't eligible to vote."

is amended to read:

> "Although not necessary to the decision in this case, we

comment that unless Vroom can escape under the provisions of Article VII of the Articles of Incorporation it is doubtful that a quorum of directors voted the salary—at least only Vroom and his secretary signed the minutes—and under general principles of Colorado corporation law, Vroom wasn't eligible to vote."

With these amendments to the findings of fact, the motion for new trial and for other amendments to the findings is denied. Defendants' motion for a stay of execution is denied; provided, however, that if defendants take an appeal, they may obtain a stay by giving a supersedeas bond in accordance with the provisions of Rule 62 (d).

Dated at Denver, Colorado, this 23rd day of June, 1972.

/s/Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO FIX
	)	AMOUNT OF
WEST END DEVELOPMENT COMPANY, et al.,	)	SUPERSEDEAS BOND
	)	
	)	
Defendants.	)	

Defendants, by their attorneys, Helmick, Conover & Burkhardt, move the Court to fix the amount of a Supersedeas Bond to be filed herein, and submit to the Court that it would be reasonable and proper to fix said bond at the amount of $27,362.37. Said amount represents the total of the Court's judgment for $15,048.75 plus interest since March 23, 1970 at the rate of 6%, the Court's judgment against Defendant Vroom for $3,128.24 plus interest at 6% since March 26, 1970, and the amount of the Court's judgment against West End Development Company for $5,000.00 plus interest at 6% from May 11, 1972, as well as the sum of $250.00 to cover costs herein and to serve in lieu of a cost bond plus interest on the amount of the judgment at 6% until May 31, 1973.

HELMICK, CONOVER & BURKHARDT.

By /s/Frederic K. Conover II
Attorneys for Defendants
700 Denver Club Building
Denver, Colorado 80202
Telephone: 292-9450

August 7, 1973

William J. Carney, Esq.
Attorney at Law
P. O. Box 3136
Aspen, Colorado 81611

Re: Irwin, et al. v. West End
Development Company, et al.

Dear Mr. Carney:

We have tried unsuccessfully to reach each other by telephone in the past week and I shall be our of town most of the coming week.

Mr. Vroom has requested that we acknowledge receipt of your letter of July 27, 1973, which letter you hand-delivered directly to him with what must be considered as a somewhat questionable request for him to sign the letter on the second page. You did not, of course, consult with us by telephone or in writing prior to making direct personal contact with Mr. Vroom.

In any event, your letter of July 27, 1973 is acknowledged as being received. We also acknowledge that under the terms of that letter you have attempted to make certain tenders of payment, although we do not admit that the tender was made in accordance with the judgment and decree of the U.S. District Court of Colorado on May 11, 1972, nor do we, of course, in any way concede that the judgment and decree of that Court was proper. As you know, we have appealed that judgment and decree to the Court of Appeals for the Tenth Circuit and although an opinion was issued from that Court some weeks ago, there is presently pending a Petition for Rehearing.

Nevertheless, please be assured that our clients intend to comply, to the extent of their ability to do so, with any judgment and decree of the courts. Accordingly, to the extent

that your letter of July 27, 1973 may be in conformance with any court order which is not modified or altered in the future, our clients will do everything within their power to comply with those orders and accept the checks of Colonel McCaleb and Majors Irwin and Lease, subject to any such modification, alteration or reversal.

However, you and your clients should be specifically advised that any purported offer of tender on behalf of Major Rock is considered as not in compliance with any valid court order, nor in compliance with any rights which Major Rock may have. We are, accordingly, instructing our clients to return to you forthwith the Rock cashiers check.

In the future, we would appreciate all communications regarding this matter to be made directly with the undersigned and not with Mr. Vroom. If we are unable to reach each other by telephone, kindly try to reach us by letter.

Very truly yours,

HELMICK. CONOVER & BURKHARDT

By /s/Frederic K. Conover II

(Dictated by Mr. Conover on
August 4, 1973)

FKC:slc
cc: Mr. Roy A. Vroom